



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

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ISCR Case No. 12-06414

Applicant for Security Clearance

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel

For Applicant: *Pro se*

03/31/2015

**Decision**

LYNCH, Noreen, A., Administrative Judge:

On August 25, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented in September 2006.

Applicant timely answered the SOR and elected to have his decision based on the written record in lieu of a hearing. Department Counsel submitted a File of Relevant Material (FORM) on January 21, 2015. Applicant received the (FORM) on January 30, 2015, and was provided an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's case.<sup>1</sup> Applicant submitted additional information for the record (Applicant EX 1). The case was assigned to me on March 27, 2015. Based on a review of the case file, eligibility for access to classified information is denied.

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<sup>1</sup>The Government conceded that Applicant had no opportunity to review or authenticate the subject interview (Item 9) prior to the SOR. Applicant objected to the admissibility.

## **Findings of Fact**

In his answer to the SOR, Applicant admitted the factual allegations under Guideline J (Criminal Conduct) and under Guideline E (Personal Conduct). (Item 3)

Applicant is a 41-year-old employee of a defense contractor. He graduated from high school in 1992. Applicant obtained his undergraduate degree in 1996. In 2001, Applicant obtained a master's degree. He attends post-graduate courses. He is married and has six children. Applicant has worked for his current employer since 2009. He submitted an application for a security clearance on January 4, 2012. (Item 5)

### **Criminal Conduct**

Applicant has two criminal arrests for domestic violence in August and October 2001. (Item 6) The victim was his first wife, from whom he is now divorced. He admits to the domestic violence arrests. Applicant pled guilty to the first misdemeanor domestic violence charge. He was fined, placed on probation for one year, and ordered to attend counseling. (Item 7)

Applicant's explanation for his August 15, 2001, arrest is based on the fact that he and his wife were in the process of a divorce, but still living together. They had two young children. He admits that he had been drinking and an argument ensued when he returned home. Applicant grabbed her wrists trying to obtain car keys. He attended court-ordered counseling classes and paid fines. He completed all probationary requirements.

As to the October 21, 2001, charge for Felony criminal sexual conduct. Applicant pled guilty to domestic violence and sentenced to 93 days in jail-deferred probation for 18 months, ordered to continue outpatient counseling, not consume drugs or alcohol, subject to random drug tests, and have no contact with the victim except for exchange of minor children. (Item 6)

Applicant denied charges of felony sexual conduct. He and his wife were intoxicated upon returning from a party. The police report revealed that according to the victim, Applicant was holding her down and demanding sex. She left the house with the two children. Applicant recalls the incident in a different manner, but realizes that the allegations are clouded in his memory due to his mental condition and the length of time. He also acknowledged that he was alcohol dependent at the time. (Item 3)

### **Rehabilitation**

Applicant has been divorced from his first wife since 2002. He remarried and has four children. He has worked as an engineer for many years. There are no other criminal incidents in the record. Applicant continued his education and has received numerous awards and certificates of recognition from his company. In 2014, Applicant received a performance cash award. He also has received certificates for courses in

leadership. He submitted a 2014 performance review which rates him as “consistently exceeds expectations.” He is regarded as a valuable member of the organization. (Response to FORM)

Applicant also noted that he has recently “informally” been diagnosed with Asperger’s Syndrome, which may in retrospect explain his earlier behavior.

## **Personal Conduct**

Applicant admitted the information that was raised under Criminal Conduct. The SOR bases the Personal Conduct allegations in ¶¶ 2.a and 2.b on the two criminal allegations to which Applicant admitted. His arrests and convictions in 2001, are not in dispute.

Applicant completed a security clearance application on January 4, 2012. In response to Section 22-Police Record, Applicant reported a 2001 DUI, but he did not disclose either domestic violence arrests that occurred in the same year.

In his Answer to the SOR, Applicant admitted to not truthfully answering Section 22-Police Record: HAVE YOU EVER been convicted of an offense involving domestic violence or a crime of violence. He answered no to this question regarding the domestic disputes. He explained that another person with a clearance advised him that he did not need to offer information or events that would be damaging to his character. He regrets that he did not list the information. He emphasizes that the events in 2001 were isolated incidents.

In his Response to FORM, Applicant elaborated on his failure to disclose the full extent of his criminal history. He denied doing such in a deliberate or willful way. It was the result of poor judgment and failure to read the questions closely as to HAVE YOU EVER?. He noted that he believed he only had to go back ten years and should not divulge encounters that may lead to a denial of his security clearance. Now he realizes that the advice was not only false but damaging to him. In his 2015 response to FORM, he changed his answer to state that he answered to the best of his knowledge. I find that he deliberately omitted relevant information on his January 4, 2012 security clearance application.

## **Policies**

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” An administrative judge must consider all

available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”<sup>2</sup> The burden of proof is something less than a preponderance of evidence.<sup>3</sup> The ultimate burden of persuasion is on the applicant.<sup>4</sup>

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”<sup>5</sup> “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>6</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.<sup>7</sup> The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

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<sup>2</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>3</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>4</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>5</sup> See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

<sup>6</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>7</sup> *Id.*

## Analysis

### Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant's admissions and the evidence of arrests in 2001 for domestic violence are sufficient to raise AG ¶¶ 31(a) and (c).

AG ¶ 32 provides four conditions that could mitigate security concerns:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

After reviewing the mitigating conditions, I find that due to the passage of time and the absence of any other criminal incidents, AG ¶ 32(a) applies. He has nothing in

his record after 2001. It was isolated with respect to his ex-wife. He is now remarried. Also, Applicant has produced evidence of rehabilitation, including good employment, higher education, and no recurrence of criminal activity since 2001. I find that he has mitigated the security concern under criminal conduct.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information,

unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant admitted in his answer to the SOR that he did not truthfully answer the question concerning having ever had any domestic arrests (Police Record) Section 22. However, he relied on a colleague who told him not to put anything that might look negative. He did remember to list a DUI arrest from the same year, 2001. Thus, it is not reasonable to assume that he forgot to list the information about the domestic violence arrests and charges the same year. He has since changed his answer. AG ¶ 16(a) applies. There is not sufficient evidence to conclude Applicant falsified his 2012 interview. SOR ¶ 1.c found for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant acknowledged his criminal behavior in his answer. Thus SOR 2a. Is found in his favor. However, as to SOR 2.b, Applicant deliberately misled the government on his 2012 security clearance application. None of the mitigating factors apply to his falsification under 2.b. As to SOR 2.c, there is unsubstantiated information, and I find for Applicant as to 2.c. I have doubts about his judgment and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct for SOR 2.b.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful



consideration of the guidelines and the whole-person concept. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant has rehabilitated himself with respect to the 2001 domestic violence incidents. He is remarried and has a good job. He has had no other criminal incidents since 2001. He has received recommendations from his job. He mitigated the criminal conduct concerns.

As to the personal conduct concerns, Applicant deliberately falsified his 2012 security clearance application with respect to the deliberate omission of the two 2001 domestic violence convictions. He relied on bad advice and then later stated that he just misunderstood. I am not persuaded by his change of answer that he did not falsify his security clearance application in 2012.

I have doubts about his judgment and reliability. Any doubts must be resolved in favor of the Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under personal conduct. Clearance is denied.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

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NOREEN A. LYNCH.  
Administrative Judge